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EXAMINER	
PHAM, VAN T	

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/518,843  
Filing Date: December 21, 2004  
Appellant(s): SCHNEIDEREIT ET AL.

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Larry Liberchuk  
For Appellant

**EXAMINER'S ANSWER**

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This is in response to the appeal brief filed 6/21/2007 appealing from the Office action mailed

Non Final Rejection on 2/05/2007.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

Claims 1-11, 15-16, 19-23 are allowed.

Claim 17 is rejected.

Claim 18 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form, "Computer readable medium having embodied thereon a computer software product . . ."

Claims 12-14 are canceled.

**(4) Status of Amendments After Final**

No amendment after final has been filed.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows:

Only rejection of claim 17 under § 101 remains.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

No evidence is relied upon by the examiner in the rejection of the claims under appeal.

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

***Claim Rejections - 35 USC § 101***

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claim 17 is rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory matter.

Claim 17 is drawn to "computer software" per se as recited in the preamble and as such is non-statutory subject matter. See MPEP § 2106.IV.B. 1 .a.

Regarding claim 17, note that data structures not claimed as embodied in computer readable media are descriptive material per se and are not statutory because they are not capable of causing functional change in the computer. See, e.g., Warmerdam, 33 F.3d at 1361, 31 USPQ2d at 1760 (claim to a data structure per se held nonstatutory). Such claimed data structures do not define any structural and functional interrelationships between the data

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structure and other claimed aspects of the invention, which permit the data structure's functionality to be realized. In contrast, a claimed computer readable medium encoded with a data structure defines structural and functional interrelationships between the data structure and the computer software and hardware components which permit the data structure's functionality to be realized, and is thus statutory. Similarly, computer programs claimed as computer listings per se, i.e., the descriptions or expressions of the programs are not physical "things." They are neither computer components nor statutory processes, as they are not "acts" being performed. Such claimed computer programs do not define any structural and functional interrelationships between the computer program and other claimed elements of a computer, which permit the computer program's functionality to be realized.

***Allowable Subject Matter***

Claim 17 would be allowable if rewritten or amended to overcome the rejection(s) under 35 U.S.C. 101 as suggested in the Response to Argument, set forth in this Office action.

Claim 18 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form, "Computer readable medium having embodied thereon a computer software product . . ."

Claims 1-11, 15-16 and 19-23 are allowed.

**(10) Response to Argument**

Applicant's arguments with respect to claims 1-11, 15-16, 18 and 19-23 have been considered but are persuasive.

However, claim 17 has been considered but they are not persuasive.

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Claim 17 recites "a computer software product that, when loaded on a computer system, causes the computer system to" which is non-statutory subject matter and data structures not claimed as embodied in computer readable media are descriptive material per se and are not statutory because they are not capable of causing functional change in the computer. Therefore, if claim 17 is written as "A computer readable medium tangibly embodied with a . . . " or "A computer readable medium having tangibly encoded thereon a . . . ", which will be a statutory subject matter. Also, claim 18 needs to be cancelled and rewrite the preamble of claim 17.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Van Pham



Conferees:



William Korzuch



Wayne Young .



WAYNE YOUNG  
SUPERVISORY PATENT EXAMINER